Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1998

JOSE MANUEL PLAZA a.k.a., JOSE MANUEL PLAZA, a.k.a. MANUEL PLAZA, a.k.a. EMANUEL PLAZA, Individually and As Assignee of THE ESTATE OF SCOTT ALLEN WISSER, Deceased and As Assignee of HAROLD LLOYD WISSER and FERN VIOLA WISSER, Co-Administrators of THE ESTATE OF SCOTT ALLEN WISSER, Deceased,

Petitioner,

-v.-

THE GENERAL ACCIDENT COMPANY a.k.a. THE GENERAL ACCIDENT INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

FRANCIS E. ZAKLUKIEWICZ
Counsel of Record
CURTIS, ZAKLUKIEWICZ, VASILE,
DEVINE & MCELHENNY,
Attorneys for Respondent
2174 Hewlett Avenue, P.O. Box 801
Merrick, NY 11566
(516) 623-1111

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QUESTIONS PRESENTED

The decisions and judgment reached by the New York State Supreme Court, the Appellate Division, First Department and the New York Court of Appeals were proper such that there is no call for an exercise of this Court's power. The questions presented are:

1. Whether Respondent's insurance policy clearly and unambiguously excludes coverage for a bodily injury claim arising out of the transmission of a communicable disease by an insured.

2. Whether the courts below properly concluded that under settled principles of New York law, the "communicable disease" exclusion contained in a policy of homeowner's insurance issued by Respondent to its insured, relieved Respondent of any duty to defend or indemnify him in an action brought by Petitioner to recover damages for injuries sustained when the AIDS virus was transmitted to him by Respondent's insured.

RULE 29.6 STATEMENT

Respondent GENERAL ASSURANCE COMPANY is a duly organized insurance company and is a member of the GENERAL ACCIDENT GROUP.

In addition to GENERAL ASSURANCE COMPANY, the GROUP consists of the following companies:

General Accident Insurance Company of America
General Accident Insurance Company of New York
Potomac Insurance Company of Illinois
Camden Fire Insurance Company
Pennsylvania General Insurance Company
PG Insurance Company of New York

The GENERAL ACCIDENT companies have finalized a merger with COMMERCIAL UNION ASSURANCE COMPANY, which, upon information and belief, is an English stock company. The merged company is known as CGU Insurance.

TABLE OF CONTENTS

Page No.

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENT

I. RESPONDENT'S POLICY PROPERLY EXCLUDES COVERAGE FOR ANY CLAIM FOR BODILY INJURY ARISING OUT OF THE TRANSMISSION OF A COMMUNICABLE DISEASE. 3

II. THE COURTS BELOW CORRECTLY INTERPRETED THE TERMS OF RESPONDENT'S POLICY IN ACCORDANCE WITH SETTLED PRINCIPLES OF STATE LAW. ... 5

CONCLUSION 8

TABLE OF AUTHORITIES

Cases: Page No.

Bragdon v. Abbott, 118 S. Ct. 1206 (1998) 6

Doe v. Coughlin, 71 N.Y.2d 48, 523 N.Y.S.2d 782 (1987) 6

Government Employees Insurance Company v. Kligler, 42 N.Y.2d 863, 397 N.Y.S.2d 777 (1977) 3

Loblaw, Inc. v. Employers Liability Assurance Corp., 57 N.Y.2d 872, 456 N.Y.S.2d 40 (1982) 7

M.H. Lipiner & Son, Inc. v. The Hanover Insurance Company, 869 F.2d 685 (2d Cir. 1989) .. 8

Miller v. Continental Insurance Company, 40 N.Y.2d 675, 389 N.Y.S.2d 565 (1976) 7

New York State Society of Surgeons v. Axelrod, 77 N.Y.2d 677, 569 N.Y.S.2d 922 (1991) 6

Playford v. Phelps Memorial Hospital Center, 174 Misc.2d 796,665 N.Y.S.2d 1017 (Westchester Co. 1977) 4

Playford v. Phelps Memorial Hospital Center, ___ A.D.2d ____, QDS: 16103405 (2d Dept. 1998) .. 4

United States Fidelity and Guaranty Company v. Annunziata, 67 N.Y.2d 299, 501 N.Y.S.2d 790 (1986) 3

12th Street Gym, Inc. v. General Star Indemnity Co., 93 F.3d 1158 (3d Cir. 1996) 7

Statutes:

42 U.S.C. §§ 12101 et. seq. 5

New York Public Health Law §225 (5)(h)1 i

STATEMENT OF THE CASE

This coverage dispute centers around the interpretation and applicability of certain exclusionary language set forth in a common homeowners' insurance contract. The trial court determined that the pertinent language unambiguously excluded coverage for the injury claims made by Petitioner, and this determination was affirmed by the Appellate Division, First Department, of the Supreme Court of the State of New York. The New York Court of Appeals subsequently denied leave to appeal and adhered to that determination on reargument.

This declaratory judgment action was brought by Petitioner in order to secure coverage under Respondent's policy for injuries sustained by him as a result of having been infected with the AIDS virus by Respondent's insured. [1] Respondent had denied coverage for this claim on the basis of a policy endorsement which excluded coverage for any "bodily injury ... which arises out of the transmission of a communicable disease by an insured." (R. 310).

Petitioner had argued at nisi prius that the term "communicable disease" had both a medical definition and a legal definition, and that the narrower legal definition did not include AIDS and HIV within its scope. Petitioner thus urged the court to find that the policy's exclusion was necessarily ambiguous because it did not specify that the term was intended to be used in its broader "medical" sense. (R. 16-17).

This argument was rejected by the trial court, which held that the term "communicable disease" had only one reasonable

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[1] See amended complaint set forth at R. 221 et seq. Petitioner had also sued the parents of Respondent's insured, but has since abandoned any argument with respect to coverage for that aspect of the underlying lawsuit.

meaning. (R. 18). The court thus enforced the plain language of the exclusionary endorsement and entered judgment declaring that Respondent owed no duty to defend or indemnify its insured for Petitioner's underlying bodily injury claims.

On appeal to the Appellate Division, and in his motion to the Court of Appeals, Petitioner expanded this argument by urging that since he was asymptomatic, the mere fact that he was HIV-positive did not mean that he had a "disease." [2] This contention was properly rejected by the appellate courts below, and thus they affirmed the finding that Respondent's communicable disease exclusion was neither ambiguous nor unduly broad.

Petitioner now seeks to add a constitutional dimension to this otherwise straightforward case of contract interpretation. Having utterly failed to dissuade the lower courts from applying time-honored principles of contract law to the issues presented in this declaratory judgment action, Petitioner now suggests that those very principles should be abandoned because they may produce disparate results depending on the specific facts of any given case.

Respondent disputes the premise of Petitioner's argument: differing facts should produce disparate results, so long as the rule of law is uniformly applied. The fact that some HIV victims might find coverage for their plight under different factual settings does not mean that this Petitioner is entitled to the same result under the facts of this case.

In short, Respondent urges this Court to reject the notion that federal law is offended by the traditional rules governing the

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[2] Petitioner has now apparently changed his position on this argument, conceding that even an asymptomatic HIV infection is still a "disease." See Bragdon v. Abbott, 118 S. Ct. 1206 (1998).

construction and interpretation of the terms of an insurance contract.

ARGUMENT

POINT I: RESPONDENT'S POLICY PROPERLY EXCLUDES COVERAGE FOR ANY CLAIM FOR BODILY INJURY ARISING OUT OF THE TRANSMISSION OF A COMMUNICABLE DISEASE.

Petitioner's opening Points of argument are predicated on the erroneous concept that Respondent's "communicable disease" exclusion somehow singles out AIDS victims. Nothing can be farther from the truth.

The exclusionary endorsement at issue was reproduced at page 310 of the Record on Appeal to the courts below. The exclusion provides:

> " Coverage E - Personal Liability and Coverage F - Medical Payments to others, do not apply to bodily injury or property damage which arises out of the transmission of a communicable disease by an insured."

Since the policy does not specifically define the terms of the exclusion, they are to be accorded their plain and ordinary meaning. Government Employees Insurance Company v. Kligler, 42 N.Y.2d 863, 397 N.Y.S.2d 777 (1977). Under New York law, the courts must refrain from re-writing an insurance agreement where its terms are clear and unambiguous. United States Fidelity and Guaranty Company v. Annunziata, 67 N.Y.2d 299, 501 N.Y.S.2d 790 (1986).

There is no suggestion in the plain words of Respondent's exclusion that one type of communicable disease is treated any

differently from another. So long as any "communicable disease" is transmitted from an insured to another, there is no coverage afforded by the policy.

Petitioner attempts to illustrate a discriminatory component to Respondent's exclusionary endorsement by citing to Playford v. Phelps Memorial Hospital Center, ___ A.D.2d ___, QDS: 16103405 (2d Dept. 1998). [3] Although that case has nothing to do with insurance coverage, Petitioner suggests that the plaintiff in that case might not have secured coverage for her claims under Respondent's endorsement since her claim "arose out of the transmission of a communicable disease."

This attempted illustration actually proves Respondent's argument. Petitioner has effectively conceded that if a communicable disease is transmitted by an insured, Respondent's exclusion would bar coverage for the bodily injury claim. Conversely, if the disease was transmitted by some means other than "by an insured", there would be coverage since the exclusion would not apply.

Respondent's policy does not mislead or discriminate in its scope: the plain words of the exclusion clearly and unambiguously preclude coverage for "bodily injury" sustained as a result of the "transmission" of any communicable disease "by an insured."

In affirming the principle that the words of an insurance contract are to be given their plain and ordinary meaning, the courts below neither offended the Fourteenth Amendment nor

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[3] This appellate decision has not been published in the advance sheets as of the date this brief was drafted. However, the decision reverses the trial court's denial of the defendant's motion to dismiss on statute of limitations grounds, which was published at 174 Misc.2d 796, 665 N.Y.S.2d 1017 (Westchester Co. 1997).

violated the letter, spirit or purpose of the Americans with Disabilities Act (42 USC §§12101 et seq.).

It borders on absurdity to suggest that the courts below violated the Americans with Disabilities Act by performing their function as courts of law. Moreover, their approval of the insurance policy endorsement at issue can hardly confer a "public" component to a private insurance contract for the purposes of subjecting its terms to scrutiny under the requirements of the Act.

Similarly, the speculative assertion that some HIV-related injuries might be covered by Respondent's policy, while others might not, is woefully insufficient to infer, much less establish, a "disparate impact" claim. Compare Lopez v. Metropolitan Life Insurance Company, 930 F.2d 157 (2d Cir. 1991) (discussing the requisite elements of such a claim in the employment context).

In short, there is no constitutional dimension to this case which warrants the time or attention of this Honorable Court.

POINT II: THE COURTS BELOW CORRECTLY INTERPRETED THE TERMS OF RESPONDENT'S POLICY IN ACCORDANCE WITH SETTLED PRINCIPLES OF STATE LAW.

Petitioner devotes the remaining Points of his brief to a repetition of the arguments raised at nisi prius and on appeal.

The fundamental premise of Petitioner's analysis is that there are different connotations to the term "communicable disease" which render the term necessarily ambiguous. Petitioner contends that since AIDS and HIV are excluded from the "communicable disease" list promulgated pursuant to New York

Public Health Law §225(5)(h), these afflictions are "legally" excluded as communicable diseases.

The courts below correctly recognized that the "communicable disease" list promulgated by the Commissioner of Health pursuant to New York's Public Health Law was not intended to provide a definitional "limitation" on communicable diseases. A disease can still be communicable even though it is not included on the Public Health Law list. New York State Society of Surgeons v. Axelrod, 77 N.Y.2d 677, 569 N.Y.S.2d 922 (1991).

AIDS and HIV are communicable diseases. New York State Society of Surgeons v. Axelrod, supra; Doe v. Coughlin, 71 N.Y.2d 48, 523 N.Y.S.2d 782 (1987). Whether asymptomatic or not, these afflictions are unquestionably "diseases" from the moment of infection. See Bragdon v. Abbott, 118 S. Ct. 1206 (1998).

The courts below correctly recognized that the public policy reasons for excluding AIDS and HIV infection rom the list of communicable diseases have nothing to do with a common-sense understanding of the term. "Placement of any disease on the communicable or sexually transmitted disease lists triggers statutory provisions . . . which, for public health reasons, may not be appropriate in dealing with every type of communicable or sexually transmissible disease." New York State Society of Surgeons v. Axelrod, supra at 925.

As the Appellate Division correctly recognized, the "average person's common-sense understanding of the term" requires the conclusion that AIDS and HIV infection are communicable diseases. In a slightly different but entirely analogous context, the New York Court of Appeals has stated that commonly used terms should be construed in accordance with the understanding of the average person ". . . who, of

course, relates [the term] to the factual context in which it is used." Miller v. Continental Insurance Company, 40 N.Y.2d 675, 389 N.Y.S.2d 565 (1976).

Petitioner suggests that even if the term "communicable disease" is unambiguous, it is nevertheless unduly broad and therefore, presumably, legally unenforceable.

He supports this argument by citing to 12th Street Gym, Inc. v. General Star Indemnity Co., 93 F.3d 1158 (3d Cir. 1996). That case, however, did not involve the actual transmission of the AIDS virus; indeed, a close reading of the case suggests that had the facts been such, the Third Circuit would have had no difficulty in enforcing the exclusion.

As the Appellate Division correctly noted below, the fact that the exclusionary endorsement operated to preclude coverage for injury caused by the transmission of any communicable disease, does not render its language unduly broad. The unambiguous intent of the exclusion, clearly and concisely communicated to the reader, is that there is no coverage under the policy where the insured injures someone by infecting him with a disease.

The average person has no difficulty in appreciating the affect of this exclusion on his homeowners coverage. Even though the exclusion may cover a range of diseases and a variety of means of transmission, there is nothing misleading (or even "unfair") about its scope.

New York courts have long recognized that where the only reasonable construction of an insurance contract is the one which happens to be favorable to the insurer, there nevertheless should be no reluctance to enforce it. Loblaw, Inc. v. Employer's Liability Assurance Corp., 57 N.Y.2d 872, 456 N.Y.S.2d 40 (1982). The courts below committed no error in

following this principle in their analysis of the scope of the exclusion.

Under settled principles of New York Law, Respondent carried its burden of showing that Petitioner's claim fell squarely within the exclusionary clause of the policy. There was no error, therefore, in determining that Respondent owed no duty to defend or indemnify its insured for the claims made by Petitioner against him. M.H. Lipiner & Son, Inc. v. The Hanover Insurance Company, 869 F.2d 685 (2d Cir. 1989).

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully Submitted,

FRANCIS E. ZAKLUKIEWICZ
Counsel of Record
CURTIS, ZAKLUKIEWICZ, VASILE,
DEVINE & MCELHENNY
Attorneys for Respondent
2174 Hewlett Avenue, P.O. Box 801
Merrick, NY 11566
(516) 623-1111